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Chandran a/l Paskaran v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05–67 OF 2008
HASAN LAH, SURIYADI AND AHMAD MAAROP JJCA
14 JULY 2010

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Criminal Law — Penal Code — ss 34, 302 — Murder and common intention — Whether appellant acted with common intention of causing bodily injury to deceased sufficient in ordinary course of nature to cause death — Appellant arriving at and leaving from crime scene together with other assailants who slashed deceased — Whether appellant responsible for ultimate criminal act done by other assailants irrespective of role played by him in perpetration of offence

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Criminal Procedure — Appeal — Appellate court, power and duty of — Duty of appellate court — Court must be slow to disturb findings of trial judge unless finding of facts not supported by evidence or against weight of evidence — Whether findings on identification of accused by witness safe

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The charge against the appellant was that on 19 July 2003 he, together with several other unknown persons, murdered one Muthuraman Krishnasamy, an offence under s 302, read with s 34 of the Penal Code ('Code'). The incident took place at about 8.15pm. Before the day of the incident there was an altercation between the appellant and his friends with Saravanan (PW7) and his friends, including the deceased. Muruli a/l Sundaraju (PW5) testified that on 19 July 2003 at about 5.30pm a group of them comprising the deceased, PW7, JN Perbakaran (PW6) and himself gathered near PW6's house for a chit-chat. At about 7.40pm a group of 12 Indian males arrived at the scene armed with parangs and attacked the deceased and his friends. PW5 testified that he saw the appellant wielding a parang and joining the group which was slashing the deceased after attacking PW5. However, under cross-examination PW5 said he did not know whether the appellant had slashed the deceased. The learned trial judge was satisfied with the evidence of identification of the appellant by PW5. The learned trial judge found that the prosecution had proven beyond reasonable doubt the charge of murder against the appellant. Hence, this appeal. Learned counsel for the appellant submitted that the case for the prosecution depended wholly on the correctness of the identification of the appellant by PW5. It was submitted that in accepting PW5's evidence the learned trial judge did not administer upon himself the guidelines required in *R v Turnbull* [1976] 3 All ER 549 against the proven dangers of mistaken

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identification evidence. The issue for determination was whether PW5's evidence of identification was good and reliable.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) An appellate court should be slow to disturb the finding of facts of the trial court. Unless it can be shown that the finding of facts was not supported by the evidence or it is against the weight of evidence or that it is a perverse finding it is not for us to disagree. The finding of the learned trial judge on the issue identification by PW5 was neither unsatisfactory nor unsafe; *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2002] 3 MLJ 193 referred (see paras 21–22).

(2) The appellant had acted with the common intention of causing bodily injury to the deceased which was sufficient in the ordinary course of nature to cause death. The appellant arrived at the crime scene together with the other assailants and were armed with parangs. The other assailants slashed the deceased. The appellant left the crime scene with the group. As such the appellant was responsible for the ultimate criminal act done by several persons in furtherance of the common intention of all irrespective of the role he played in the perpetration of the offence; *Krishna Rao a/l Gurumurthi v Public Prosecutor and another appeal* [2009] 3 MLJ 643 referred (see para 23).

(3) The appellant's defence was a bare denial and it had not created any reasonable doubt to the prosecution case. On the totality of the evidence adduced, the learned trial judge was justified in finding the appellant guilty of the offence of murder under s 302 read with s 34 of the Code (see paras 24–25).

[Bahasa Malaysia summary

Tuduhan terhadap perayu adalah bahawa pada 19 Julai 2003, dia bersama beberapa orang yang tidak diketahui, telah membunuh Muthuraman Krishnasamy, kesalahan di bawah s 302, dibaca bersama s 34 Kanun Keseksaan ('Kanun'). Kejadian tersebut berlaku kira-kira 8.15malam. Sebelum hari kejadian tersebut, terdapat pertengkaran di antara perayu dan rakan-rakannya dengan Saravanan ('PW7') dan rakan-rakannya, termasuk si mati. Muruli a/l Sundaraju ('PW5') memberi kenyataan bahawa pada 19 Julai 2003 kira-kira 5.30petang mereka sekumpulan yang terdiri daripada si mati, PW7, JN Perbakaran ('PW6') dan dirinya sendiri telah berkumpul berhampiran rumah PW6 untuk berbual. Sekitar 7.40pm, sekumpulan 12 lelaki India muncul di tempat kejadian bersenjatakan parang menyerang si mati dan rakan-rakannya. PW5 memberi kenyataan bahawa dia melihat perayu menggunakan parang dan mengikut serta kumpulan yang sedang menetak si mati selepas menyerang PW5. Walau bagaimanapun, semasa pemeriksaan balas PW5 mengatakan bahawa dia tidak tahu sama ada perayu telah menetak si mati. Hakim bicara

yang bijaksana berpuas hati dengan keterangan pengenalan perayu oleh PW5. Hakim bicara yang bijaksana mendapati bahawa pihak pendakwaan telah membuktikan melampaui keraguan yang munasabah tuduhan membunuh terhadap perayu. Justeru, rayuan ini. Peguam perayu yang bijaksana berhujah bahawa kes pihak pendakwaan bergantung sepenuhnya kepada pengecaman perayu yang betul oleh PW5. Adalah dihujahkan bahawa dengan menerima keterangan PW5 hakim bicara yang bijaksana tidak mengingatkan dirinya tentang garis panduan yang diperlukan di dalam kes *R v Turnbull* [1976] 3 All ER 549 terhadap bahaya yang terbukti daripada keterangan pengenalan yang salah. Isu untuk ditentukan adalah sama ada keterangan mengenalpasti PW5 adalah baik dan boleh dipercayai.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Mahkamah Rayuan seharusnya teragak-agak untuk campur tangan penemuan fakta mahkamah perbicaraan. Melainkan ianya dapat ditunjukkan bahawa penemuan fakta tidak disokong oleh keterangan atau bertentangan dengan pertimbangan keterangan atau ianya penemuan yang bertentangan, ianya bukan bagi Mahkamah Rayuan untuk tidak bersetuju. Penemuan hakim bicara yang bijaksana mengenai isu pengenalan oleh PW5 bukanlah tidak memuaskan atau tidak selamat; *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2002] 3 MLJ 193 dirujuk (lihat perenggan 21–22).

(2) Perayu telah bertindak dengan niat bersama untuk menyebabkan kecederaan badan terhadap si mati yang mana mencukupi dalam keadaan biasa dan semulajadi untuk menyebabkan kematian. Perayu tiba di tempat jenayah bersama dengan penyerang yang lain bersenjatakan parang. Penyerang yang lain telah menetak si mati. Perayu meninggalkan tempat jenayah dengan kumpulan tersebut. Oleh itu, perayu bertanggungjawab untuk tindakan jenayah utama yang dilakukan oleh beberapa orang dengan niat bersama tidak mengambilkira peranannya dalam melakukan kesalahan tersebut; *Krishna Rao a/l Gurumurthi v Public Prosecutor and another appeal* [2009] 3 MLJ 643 dirujuk (lihat perenggan 23).

(3) Pembelaan perayu adalah penafian semata-mata dan tidak menyebabkan sebarang keraguan yang munasabah kepada kes pihak pendakwaan. Berdasarkan keseluruhan keterangan yang dikemukakan, hakim bicara yang bijaksana telah menjustifikasikan penemuan kebersalahan perayu terhadap kesalahan membunuh di bawah s 302 dibaca bersama s 34 Kanun tersebut (lihat perenggan 24–25).]

Notes

For cases on ss 34, 302 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2125–2138.

For cases on appellate court, power and duty of, see 5(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 212–282.

Cases referred to

Dato Mokhtar bin Hashim v PP [1983] 2 MLJ 232, FC (refd)
Dato' Seri Anwar bin Ibrahim v PP [2002] 3 MLJ 193; [2002] 3 CLJ 457, FC (refd)
Jaafar bin Ali v PP [1998] 4 MLJ 406; [1999] 1 CLJ 410, HC (refd)
Krishna Rao a/l Gurumurthi v Public Prosecutor and another appeal [2009] 3 MLJ 643, FC (refd)
KS Roberts v PP [1970] 2 MLJ 137 (refd)
R v Turnbull [1976] 3 All ER 549, CA (refd)

Legislation referred to

Penal Code ss 34, 302

Appeal from: Criminal Trial No 45–23 of 2004 (High Court, Johor Bahru)

Gobind Singh Deo (Gobind Singh Deo & Co) for the appellant.
Tetralina Ahmed Fauzi (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Hasan Lah JCA:

[1] On 16 April 2008 the appellant was convicted of the offence of murder and sentenced to death under s 302 of the Penal Code.

[2] On 23 February 2010, after hearing the appellant's appeal, we dismissed his appeal and affirmed the decision of the learned trial judge.

[3] The charge against the appellant was that on 19 July 2003 he, together with several other unknown persons, murdered one Muthuraman Krishnasamy a/l Krishnasamy, an offence under s 302, read with s 34 of the Penal Code.

[4] The facts of the case can be stated as follows.

[5] The incident giving rise to this case took place at about 8.15pm on 19 July 2003 near a house at No 94, Jalan Lading 22, Taman Puteri Wangsa, Ulu Tiram, Johor Bahru. However, before the day of the incident there was an altercation between the appellant and his friends with Saravanan (PW7) and his friends, including the deceased, at the same place whereby PW7 was hit with a steel pipe and stick. Muruli a/l Sundaraju (PW5) testified that on 19 July 2003 at about 5.30pm a group of them comprising the deceased, Ravi,

Saravanan (PW7), JN Perbakaran (PW6) and himself gathered under a cherry tree near JN Perbakaran's house for a chit-chat.

[6] At about 7.40pm a group of 12 Indian males arrived at the scene on six motorcycles. They were armed with parangs. They rushed to the place where PW5 and his friends were sitting and attacked PW5, Saravanan a/l Palanisamy, Ravi and the deceased. PW5 was slashed on his back and neck from behind three times by the appellant. Whilst attempting to run PW5 fell and when he turned around he saw the assailant was the appellant. In his evidence PW5 said:

> Kesemua 12 orang yang menaiki motosikal terus menerpa dan mereka memegang parang dan menetak. Mereka menetak Ravi dahulu dan selepas itu DJ. Saya sempat lari tetapi ditetak di bahagian tengkuk belakang. Jeeva sempat melarikan diri.
>
> Saya nampak seorang bernama 'Boy' yang menetak saya – Boy dicam sebagai tertuduh.
>
> Saya tahu Boy yang menetak kerana saya toleh ke belakang dan nampaknya selepas saya jatuh akibat tetak. Saya tanya dia 'kenapa' tetapi Boy terus beredar dari sana.
>
> Saya melarikan diri dan masuk ke dalam rumah kosong di deret yang sama. Saya tidak sempat melihat yang lain kerana kesemua mereka memakai topi keledar dan keadaan di situ gelap.
>
> Ya, Boy pun pakai topi keledar.
>
> Saya ada nampak mereka menetak DJ tetapi saya tidak cam mereka.
>
> Saya tidak nampak Boy menetak DJ tetapi beliau berada dengan kumpulan tersebut.
>
> Ya, Boy ada memegang parang dan menunjuk ke arah DJ.
>
> Saya tidak perasan siapa yang ada lagi di situ selepas saya melarikan diri.
>
> Saya melarikan diri seorang. Saya kenal OKT – 3 tahun sebelum kejadian – dia kawan saya – kawan biasa – duduk di taman yang sama.

[7] PW5 saw the appellant wielding a parang and joining the group which was slashing the deceased after attacking PW5. Under cross-examination he said he did not know whether the appellant had slashed the deceased.

[8] PW7, Saravanan a/l Palanisamy, who was referred to by PW5 as 'Jeeva' in his evidence testified that they were attacked with parangs by about 12 males who came to the place on motorcycles. He managed to run away. When he and PW5 went back to the place of the incident afterwards he saw the deceased lying there, injured and was bleeding.

[9] PW7 did not see the faces of the assailants as most of them were wearing crash helmets. He confirmed that there was an altercation between him and the appellant's friends before that day at the same place concerning a CD player.

[10] The deceased died on the way to the Sultanah Aminah Hospital. According to PW1, the Forensic Pathologist, who performed the post mortem examination on the deceased, the deceased had suffered many incised wounds which injured his head and limbs. The cause of his death was multiple injuries due to the incised wounds.

[11] The appellant elected to give evidence under oath. His defence had been summarised by the learned trial judge as follows:

> The accused testified that he has never been to No 94, Jalan Lading 22 although he knows where Jalan Lading 22 is. He has never been to the crime scene which is under the cherry tree opposite the said house. He denies that the 'CD' player argument took place at the crime scene. Accused gives a detailed elaboration of his work-schedule from day to night. He works for someone named 'Nathan' and works with his younger brother. Accused knows the witness's SP5, SP6 and SP7 and also knows the deceased. Accused was never at the crime scene the night of the incident. He came to know of the crime only after a policeman named 'Martin' had asked him to show where Jalan Lading 22 is situated.

[12] With regard to the appellant's defence the learned trial judge made the following finding:

> Upon a maximum evaluation of the accused evidence as tested against the prosecution's evidence it is my finding that the accused evidence is one of bare denial. This is clearly borne out by his defence that he does not know the crime scene, he had never been there; denying the earlier 'CD' player argument occurred at the crime scene but at a 'taman permainan' contrary to the testimony of SP5, SP6 and SP7 that it took place at the crime scene. In fact he even downplayed the event and said it was merely a case of 'tolak-menolak' whereas, prosecution witnesses SP5, SP6 and SP7 all say that 'Jiva' (SP7) was hit on the head with a steel pipe. Then he goes on to say that he held a job at that time driving a van for someone named 'Nathan'. He says that he worked everyday and came back from work at about 8.30pm, sometimes 9pm. On the night the offence took place, he was at home washing his car. This aspect of the defence testimony was never put to the investigating officer or any other witnesses that the accused had a job at that time; neither was the prosecution given any notice of alibi with witnesses to support this claim. Hence by virtue of s 402A of the Criminal Procedure Code that prerequisites of the defence of alibi not having been fulfilled needs no consideration. In addition to this, this line of defence is clearly an afterthought. The accused testimony that he showed a certain police officer by the name of 'Martin' the crime scene and only came to know of the crime after that was never put to the investigating officer and is clearly an afterthought.

[13] At the conclusion of the trial the learned trial judge held that the appellant had failed to raise a reasonable doubt and the prosecution had proven beyond reasonable doubt the charge of murder against the appellant.

[14] Before us, learned counsel for the appellant submitted that the case for the prosecution depended wholly on the correctness of the identification of the appellant by PW5. It was submitted that in accepting PW5's evidence the learned trial judge did not administer upon himself the guidelines required in *R v Turnbull* [1976] 3 All ER 549 against the proven dangers of mistaken identification evidence. It was further submitted that the learned trial judge failed to direct his mind to the question of whether at the material time PW5 was alleged to have seen the appellant slashing him and returning to the group who attacked the deceased, there was in fact opportunity for PW5 to recognise the appellant as one of the assailants. The prosecution also failed to lead evidence which related to how long PW5 had sight of the assailant, the lighting, the distance, how many times PW5 had seen the appellant before the incident, which were necessary to assess the evidence of identification. Learned counsel for the appellant further submitted that there was no other evidence to connect the appellant to the incident and the evidence as it stood was unsafe for the purpose of convicting the appellant.

[15] As such the issue for determination in this appeal was whether the evidence of identification by PW5 could be said to have been good and reliable. In this connection the learned trial judge said in his judgment that:

> In the light of my finding that the accused defence is one of bare denial and against my satisfaction that the prosecution witnesses evidence remained firm and unchallenged the accused defence has not created any reasonable doubt in my mind. The accused does not claim to have any animosity towards the prosecution witnesses nor is there any hint of evidence to show why SP5 would lie about seeing the accused at the scene of the crime. I have no doubt as to the testimony of SP5 that he saw the accused person at the crime scene and he was wielding a 'parang' and involved in the attack which resulted in the death of the deceased.

[16] On the *Turnbull* guidelines, Augustine Paul J (as he then was) said in *Jaafar bin Ali v Public Prosecutor* [1998] 4 MLJ 406 at p 417; [1999] 1 CLJ 410 at p 420 that:

> However, it has been emphasised that where the primary issue is the identity of the accused the principles set out in *Turnbull* must be followed (see*Mc Shane v Northumbria Chief Constable* (1980) 72 Cr App R 208; *R v Hunjan* (1978) 68 Cr App R 99; *R v Weeder* (1980) 71 Cr App R 228; *R v Breslin* (1984) 80 Cr App R 226). They apply to non-jury as well as jury trials (see *Grbic v Pitkethly* (1992) 38 FCR 95; *Sharret v Gill* (1993) 65 A Crim R 44; *Arumugam s/o Muthusamy v Public Prosecutor* [1998] 3 MLJ 73; [1998] 3 CLJ 597). Thus they would apply in this case. Whatever the defence and however the case is conducted, where evidence as to identification represents any significant part of the proof of guilt of an offence, the judge must warn the jury as to the dangers of convicting on such evidence where its reliability is disputed (see *Dominican v R* (1992) 173 CLR 555). The terms of the warning need not follow any particular formula (see *R v De-Cressac* [1985] 1

NSWLR 381; *Finn v R* (1988) 34 A Crim R 425). But it must be cogent and effective (see *R v Dickson* [1983] 1 VR 227; *Reid (Junior) v R* [1990] 1 AC 363). A warning in general terms is not sufficient (*Kelleher v R* (1974) 131 CLR 534). The warning must be appropriate to the circumstances of the particular case (see *Smith v R* (1990) 64 ALJR 588).

Failure to warn of the dangers of identity evidence may lead to the ordering of new trials or the quashing of convictions (see *R v Preston* [1961] VR 861; *Dominican v R* (1992) 173 CLR 555; *R v Keane* (1977) 65 Cr App R 247). On the sort of warning that must be given useful reference may be made to*Dominican v R* (1992) 173 CLR 555 where the majority said at p 565:

…

The quality of the identification evidence that is required includes a description of the accused that the identifying witness must have given to the police. The need for such description is implicit in *Turnbull* itself and has been stressed in cases such as *R v Atfield* (1983) 25 Alta LR (2d) 97; *R v Power* (1987) 67 Nfld & PEIR 272 and *Public Prosecutor v Amar Singh* [1948-49] MLJ Supp 55. In my opinion it is necessary for an indentifying witness to give a description of the accused especially in cases where the accused was not known to the witness prior to the incident. *It may not be necessary where there is other supporting evidence on the identification of the accused and when the accused is well known to the witness.…* (Emphasis added).

[17] In *Dato Mokhtar bin Hashim v Public Prosecutor* [1983] 2 MLJ 232 Hashim Yeop A Sani J (as he then was) said at p 261:

As regards all these three witnesses it is important in my opinion to draw a distinction between recognition and identification. Recognition is more reliable than mere identification. Recognition of a person known to the witness would be more reliable than identification by a witness of a stranger. Some pertinent questions were put by the Lord Chief Justice in the judgment of the Court of Appeal in *Raymond Turnbull & Ors* (13) appearing at p 137 as follows:

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation?

At what distance? In what light? Was the observation impeded in any way, as for example, by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long had elapsed between the original observation and the subsequent identification to the police?

[18] In *KS Roberts v Public Prosecutor* [1970] 2 MLJ 137 Raja Azlan Shah J made the following observation on the issue of identification of an accused person:

> Identification is a fact or circumstance which must be proved against an accused person before it can be relied upon and used against him. A fact or circumstance is held to be proved only when it fulfils the definition of the word 'proved' given in s 3 of the Evidence Ordinance. The evidence of identification is as much subject to this definition as any other kind of evidence but it would appear to me that in assessing the evidence of identification the trial court does not apply the tests provided in this section. It is true that an absolute certainty is not required but the court has to test the evidence with prudence and accept it only when it is so highly probable that its truth can safely be accepted. The test excludes from its orbit blind faith of a true believer, because prudence and credulity do not go together.

[19] In the instant case the learned trial judge was satisfied with the evidence of identification of the appellant by PW5. On the facts of the case we are of the view that there were evidence to support the correctness of PW5's identification. PW5 knew the appellant three years before the incident took place. In fact the appellant was his friend and the appellant resided in the same neighbourhood. Before the incident there was an altercation between PW7 and his friends (including the deceased) with the appellant and his friends at the same place. As such this was more a case of recognition rather than identification.

[20] Further, SP5 did mention to SP6 and SP7 on the night of the incident that he saw the appellant as one of assailants that attacked them that night. When the appellant was attacking him with a parang he asked the appellant 'kenapa' (why)? At that place there was a street light. PW5 said in his evidence under cross-examination:

> Walau gelap saya boleh cam Boy (the appellant) kerana tempat saya jatuh ada tiang lampu dan keadaan cerah.

[21] It is an established principle of law that an appellate court should be slow to disturb the finding of facts of the trial court. Unless it can be shown that the finding of facts was not supported by the evidence or it is against the weight of evidence or that it is a perverse finding it is not for us to disagree (see *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2002] 3 MLJ 193; [2002] 3 CLJ 457).

[22] Under the circumstances we do not think that the finding of the learned trial judge on this issue is either unsatisfactory or unsafe.

[23] PW5 did not see the appellant slashing the deceased. He only saw the appellant who was holding a parang going towards the group that was attacking the deceased. PW5 saw the deceased being attacked but he could not see the faces of the attackers. On the evidence adduced the learned trial judge held that

the appellant had acted with the common intention of causing bodily injury to the deceased which was sufficient in the ordinary course of nature to cause death. We agree. The appellant arrived at the crime scene together with the other assailants and were armed with parangs. The other assailants slashed the deceased. The appellant left the crime scene with the group. As such the appellant is responsible for the ultimate criminal act done by several persons in furtherance of the common intention of all irrespective of the role he played in the perpetration of the offence (see *Krishna Rao a/l Gurumurthi v Public Prosecutor and another appeal* [2009] 3 MLJ 643; [2009] 2 CLJ 603).

[24] The learned trial judge had carefully considered the appellant's defence and held that the defence was a bare denial and it had not created any reasonable doubt to the prosecution case. He gave his reasons for the findings. We found no reason to disturb his findings.

[25] In our judgment, on the totality of the evidence adduced, the learned trial judge was justified in finding the appellant guilty of the offence of murder under s 302 read with s 34 of the Penal Code. We were satisfied that the conviction of the appellant is safe. The appeal was therefore dismissed and the conviction and sentence affirmed.

Appeal dismissed and conviction and sentence affirmed.

Reported by Kanesh Sundrum